92-2060

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMIE MARIE (BUNGER) PRAYSON,
and JASON DEAN (BUNGER) PRAYSON,

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1.

Does the decision of the Western District of the Missouri Court of Appeals in this case conflict with *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed.2d 296 (1971), where: (a) since 1928, the survivors of an employee of an independent contractor killed on the job could recover from a landowner under a theory of vicarious liability if the employee was engaged in inherently dangerous activity at the time of his death, and (b) on February 13, 1991, the two minor plaintiffs obtained a judgment of $1,300,000 for the death of their father under this doctrine, and (c) on May 3, 1991, the Supreme Court of Missouri abolished the doctrine, and (d) the Missouri Court of Appeals retroactively applied the Missouri Supreme Court's decision and held that the reliance factor did not include decisions about whether to litigate, and held that the decision was "clearly foreshadowed" by the decisions of non-Missouri jurisdictions abolishing the doctrine and the enactment of Missouri's worker's compensation law in 1928?

2.

Does a jury verdict in favor of two minor plaintiffs become a vested or property right at the time of the verdict, so that there is a denial of the plaintiffs' Fifth and Fourteenth Amendment due process rights when a Missouri Supreme Court decision

nearly three months after the verdict abolishes the theory of recovery under which the verdict was obtained and is retroactively applied to deprive the plaintiffs of the jury's award of $1,300,000 for the wrongful death of their father?

3.

Is there a denial of the minor plaintiffs' Fourteenth Amendment equal protection rights where, under Missouri law, a change in the judicial interpretation of a statute cannot be applied retroactively to deprive persons of vested rights based on the prior construction of the statute, but a judicial abolition of a tort theory of recovery can be applied retroactively to take away a jury verdict awarded under the prior doctrine?

4.

Has there been a denial of the minor plaintiffs' Fifth and Fourteenth Amendment equal protection and/or due process rights where they are denied leave to plead a theory of direct liability against the defendant landowner; they obtain a jury verdict based on a theory of vicarious liability; a Missouri Supreme Court decision abolishing the theory of recovery is applied retroactively to take away the verdict and the plaintiffs are denied the opportunity to proceed on their theory of direct liability, when Missouri law in fact permits direct liability claims against landowners?

LIST OF PARTIES

Plaintiffs-Petitioners:

Jamie Marie (Bunger) Prayson and Jason Dean (Bunger) Prayson, by and through their mother and next friend, Mary Jane Prayson

Defendant-Respondent:

Kansas City Power & Light Company

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JURISDICTIONAL STATEMENT

On December 22, 1992, the Western District of the Missouri Court of Appeals handed down its decision in the case of *Prayson v. Kansas City Power & Light Company*, 847 S.W.2d 852 (W.D. Mo. App. 1992). On February 2, 1993, the Western District of the Missouri Court of Appeals denied Plaintiffs' Motion for Rehearing, or in the Alternative, for Transfer to the Supreme Court of Missouri. On March 23, 1993, the Supreme Court of Missouri denied Plaintiffs' Motion to Transfer.

This Court has jurisdiction to review the judgment of the Western District of the Missouri Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1257.

Constitutional Provisions

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 18, 1985, Larry Dean Bunger (the father of Plaintiffs Jamie Marie (Bunger) Prayson and Jason Dean (Bunger) Prayson, was an employee of B & L Electric. Prior to that date Kansas City Power & Light Company had entered into a contract with B & L to perform work on KCP&L lines, including the installation of lightning arrestors and squirrel proofing of the transformers on utility power lines. On January 18, 1985, Mr. Bunger was installing lightning arrestors and squirrel proofing the transformer on a KCP&L utility power line. In the process, he de-energized the transformer by opening the fuse on the fuse mounting, and while using a non-insulated wrench with his right hand to loosen a bolt on the bottom of the fuse mounting, his hand slipped and he brought the non-insulated tool into contact with the top of the fuse mounting, which was still energized. He died as a result.

In 1928, the Missouri Supreme Court decided that a landowner could be held vicariously liable for the injury or death of an employee of an independent contractor if the employee was engaged in an inherently dangerous activity at the time of the injury or death. The case overruled a 1912 decision holding that the landowner could not be held liable,

and it arose out of a fact situation that occurred prior to the enactment of Missouri's workers' compensation law in 1928.

In 1988, Mr. Bunger's children, through their mother, filed a wrongful death action against KCP&L in the Circuit Court of Jackson County, Missouri. In 1990, the Missouri Supreme Court reaffirmed the validity of the inherently dangerous activity doctrine, but also stated that it was possible to state a claim of direct liability against the landowner. The Praysons asked leave to set out a direct liability claim in Count I of a Second Amended Petition, and a vicarious liability claim under the 1990 decision in Count II. The trial court denied leave to file the Second Amended Petition on the basis that Count I failed to state a cause of action. Plaintiffs filed a Third Amended Petition, limited to a vicarious liability claim under the inherently dangerous activity doctrine.

Plaintiffs proceeded to trial against KCP&L and on February 13, 1991, a jury awarded them $2,000,000 in damages, but found Mr. Bunger 35% at fault, which reduced the award to $1,300,000. While KCP&L's motion for new trial or in the alternative, for judgment n.o.v., was pending, the Missouri Supreme Court, on May 3, 1991, handed down a decision which abolished the inherently dangerous activity

doctrine where the employee of the independent contractor was covered by workers' compensation.

The trial court applied the May 3, 1991, decision retroactively and granted KCP&L's motion for judgment n.o.v., but stated that if it were not for the Missouri Supreme Court's decision the verdict would have remained in effect. On December 22, 1992, the Missouri Court of Appeals, Western District, affirmed the trial court, and refused to permit Plaintiffs to pursue their direct liability claim against KCP&L. Following a denial by the Missouri Court of Appeals of Plaintiffs' Motions for Rehearing or Transfer to the Supreme Court, the Missouri Supreme Court denied Plaintiffs' Motion to Transfer on March 23, 1993.

Following the decision of the Missouri Supreme Court on May 3, 1991, which abolished the theory of recovery under which Plaintiffs had obtained a verdict on February 13, 1991, Plaintiffs raised their constitutional arguments in their Suggestions in Opposition to the retroactive application of that decision. [Appendix Vol. 2 at 64.] In the Missouri Court of Appeals, Plaintiffs argued their equal protection and due process claims. Point I of the Praysons' argument in that Court (as found in the Table of Contents of their brief), reads:

I. The trial court erred in holding that *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc) was retroactive, and therefore required the granting of Defendant Kansas City Power & Light Company's Motion for Judgment Notwithstanding the Verdict. The *Zueck* decision is a prospective decision because it is procedural, rather than substantive, or alternatively, if it is a substantive decision, it meets the three-prong test of *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985) (en banc) for prospective application since it overrules clear past precedent; the purpose of the *Zueck* decision would be retarded by retroactive application and because appellants relied on the pre-*Zueck* case law in making their determination to proceed with this litigation.

Section 1. Procedural or Substantive

Section 2. The Fundamental Fairness Tests

Section 3. Equal Protection

Section 4. Due Process

Section 5. Conclusion

In its decision, the Missouri Court of Appeals addressed the Praysons' constitutional arguments:

> As their final arguments under Point I, the Praysons argue that (1) retroactive application of a change in tort law effected by a judicial decision constitutes a denial of equal protection, and (2) the trial court's granting of the j.n.o.v. constituted an unjust taking because the jury verdict in favor of the Praysons became a vested property right under the due process clauses. The Prays fail to cite Missouri authority for either of these arguments. Point I is denied.

[Appendix Vol. 1 at 19.]

Argument

Section 1. Introduction

The issues in this Petition fall into two areas: (1) the constitutional validity of retroactive application of a 1991 decision of the Supreme Court of Missouri which abolished a vicarious liability theory of recovery under which the minor plaintiffs had obtained a $1,300,000 judgment against Kansas City Power & Light Company (KCP&L) three months prior to the overruling decision, and (2) the constitutionality of denying the plaintiffs, who had attempted to plead a direct liability theory of recovery but were denied leave to do so, the opportunity to plead and prove their claim of direct liability on the part of KCP&L for the death of their father.

Section 2. Conflict with *Chevron Oil Company v. Huson*, Equal Protection and Due Process

In 1985, the Supreme Court of Missouri adopted a three-factor test to determine whether an overruling decision would be applied prospectively or retroactively:

> In order to clarify the issues regarding the operation of judicial decisions, we adopt a three-factor test to determine whether an overruling decision of this Court should be given prospective-only effect. First, the decision in question "must establish a new principle of law...by overruling clear past precedent...." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed.2d 296 (1971). Second, the Court must

> determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. *See* [*Linkletter v. Walker*, 381 U.S. 618, 629, 85 S. Ct. 1731, 1737, 14 L. Ed.2d 601 (1965)]. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule. [Citation omitted.]

Sumners v. Sumners, 701 S.W.2d 720, 724 (Mo. 1985) (en banc). The Missouri Supreme Court was relying on the decisions of this Court in deciding how to deal with the question of retrospective *vs.* prospective application of an overruling decision.

> If the parties have relied on the state of the decisional law as it existed prior to the change, courts may apply the law prospectively in order to avoid injustice and unfairness.
>
> > One of the most important factors considered by the courts "in deciding whether and to what extent a judicially changed rule of law should be give retroactive effect" is "the degree to which the prior rule may have been justifiably relied on". Annot. 10 A.L.R.3d 1371, 1378 (1966).

Id. at 723. And later:

> By applying a decision prospectively-only when reliance by a party is found, courts seek to avoid

> injustice, hardship and unfairness. [Citations omitted.] A standard which seeks to avoid injustice, hardship and unfairness requires that the interests of parties on both sides of the prospective-retrospective issue be weighed. A court must balance the hardship imposed on those who may have relied on a precedent against the hardship which may result for those who do not benefit from the application of a change in precedent.

Id.

This Court's standards on the nonretroactivity issue were set out in *Chevron Oil Company v. Huson*, 404 U.S. 97, 106-107, 92 S. Ct. 349, 355, 30 L. Ed.2d 296 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted], or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted.] Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [Citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citation omitted.]

In *Chevron*, the plaintiff's injuries occurred in 1965; he filed suit in federal court in 1968, and in 1969 this Court decided *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed.2d 360 (1969), which in theory would have made his suit untimely, since *Rodrigue* mandated the application of the relevant state statute of limitations (in *Chevron*, the Louisiana one-year statute).

> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these [prior] Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." [Citation omitted.]
>
> ...retroactive application of the Louisiana statute of limitations would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.
>
> It would also produce the most "substantial inequitable results," [citation omitted], to hold that the [plaintiff] "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him. ...Certainly, the [plaintiff's] potential redress

> for his allegedly serious injury—an injury that may significantly undercut his future earning power—is entitled to similar protection. ...nonretroactive application here simply preserves his right to a day in court.

Chevron, 404 U.S. at 107, 92 S. Ct. at 356.

In applying *Chevron*, the Missouri Court of Appeals held that the reliance factor was applicable only to decisions made by the plaintiff(s) *prior* to the event which gave rise to the litigation. For example, *Trans UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. 1991) (en banc), involved a situation where an earlier decision of the Missouri Supreme Court adopted a certain policy relating to state use taxes. Trans UCU relied on that decision and the advice of its attorneys when purchasing an airplane out-of-state and placing it into service, and in not paying Missouri use taxes on the acquisition. Four years after the first decision, the Missouri Supreme Court reversed itself, making a transaction of the type Trans UCU engaged in a taxable transaction and the Missouri Director of Revenue sought back taxes, interest and penalties from Trans UCU. The Missouri Supreme Court applied its overruling decision prospectively, because of the court's sudden and unexpected change of direction, and Trans UCU was not liable for the taxes.

The Missouri Court of Appeals held [Appendix Vol. 1 at 17] that application of the reliance factor did not apply to decisions about whether or not to litigate, but only to decisions made prior to the event which gave rise to the litigation. It pointed out that UCU relied on existing law in making a business decision, and therefore that was why the Missouri Supreme Court's change of heart about the tax consequences of that decision, *after* the purchase was made, had to be applied prospectively.

This is clearly in conflict with *Chevron*. There, the plaintiff relied on existing law (and inferentially on the advice of his counsel) in determining when to sue, and in determining whether his suit was time-barred. The case had only proceeded through a year of discovery, yet this Court held that it would be inequitable to deny Mr. Huson his day in court, particularly when his injuries were allegedly sufficiently serious to have a significant detrimental effect on his future earnings. In this case, the minor plaintiffs relied on Missouri law that had been in effect for more than six decades, and on the advice of their counsel, when deciding whether it was possible to sue the landowner (KCP&L) for the death of their father, and thereafter initiating the litigation and carrying it through to a trial and a verdict in their favor.

In *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16, 24 (1912), the Missouri Supreme Court held that the inherently dangerous activity exception was not applicable to employees of an independent contractor. Sixteen years later, in *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617, 624-627 (Mo. banc 1928), *Salmon* was overruled and the inherently dangerous activity exception was extended to employees of independent contractors, making the landowner vicariously liable for the employee's injuries. As late as 1990, shortly before the trial in this case, the Missouri Supreme Court reaffirmed the doctrine of vicarious liability for landowners for the death or injury of an employee of an independent contractor engaged in an inherently dangerous activity at the time of the death or injury. *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc).

Plaintiffs attempted to file a Second Amended Petition to include a direct liability claim against KCP&L, and a vicarious liability claim. [Appendix Vol. 1 at 31.] The trial court, believing that *Ballinger* eliminated the possibility of a direct liability claim, denied plaintiffs leave to file the Second Amended (two-Count) Petition. The trial court did, however, permit the filing of the Third Amended Petition [Appendix Vol. 2 at 49], which contained only the vicarious liability claim, and

it was the trial of this claim which resulted in the $1,300,000 verdict in favor of the plaintiff children. After the verdict in this case, but prior to the trial court's ruling on KCP&L's motion for new trial, the Missouri Supreme Court overruled *Mallory*, in *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc). Plaintiffs argued that they were denied their Fifth and Fourteenth Amendment due process and equal protection rights by the retroactive application of *Zueck*.

In purporting to apply *Chevron*, the Missouri Court of Appeals held:

> Although *Zueck* overrules *Mallory* and all cases following *Mallory*, neither *Mallory* nor *Ballinger*, which followed *Mallory*, can be considered clear past precedent on the issue of whether the inherently dangerous activity exception should be applied to employees of independent contractors covered by workers' compensation, the issue considered in *Zueck*. *Mallory* involved an accident suffered by an employee prior to the effective date of Missouri's first workers' law, and did not consider the impact of the new law. *Zueck*, 809 S.W.2d at 387. *Mallory* could not establish clear precedent on the issue presented in *Zueck*. While *Ballinger* was decided after the effective date of workers' compensation laws, "the dispositive issue [in *Zueck*]...was not before the court in *Ballinger*." *Zueck*, 809 S.W.2d at 387.

While *Zueck* may establish a new principle of law by deciding an issue of first impression, the resolution of this issue was clearly foreshadowed. As the *Zueck* court notes,

> With the advent of Workers' Compensation laws, most states have restricted the application of the inherently dangerous doctrine to its original concept—protection of innocent third parties not involved in the activity. Thus, under the law of those jurisdictions, employees of independent contractors may not recover from the landowner by invoking the inherently dangerous exception.

Id. The first part of the *Sumners* fundamental fairness test does not call for prospective-only application of *Zueck*.

[Appendix Vol. 1 at 11-12.]

This holding represents a conflict with *Chevron* that is equal to or greater than the holding of the Missouri Court of Appeals that decisions to litigate based on existing law may not be considered as "reliance" on existing law for purposes of determining nonretroactivity. *Chevron* looked at two possibilities: the overruling of clear past precedent *or* the deciding of a question of first impression where the result was not "clearly foreshadowed."

The error in the Missouri Court of Appeals' application of *Chevron* in this instance lies first in its "clear past precedent" analysis. The court found there was no clear past

precedent because: (a) *Zueck* amounted to a return to the 1912 doctrine of non-liability, rather than the announcement of an entirely new doctrine, and (b) *Mallory* and *Ballinger* were not clear past precedent because the issue of the effect of workers' compensation laws on the inherently dangerous activity doctrine of vicarious liability for landowners had never been expressly addressed.

While it is true that *Chevron* dealt with prior decisions of the federal Courts of Appeals which had directly addressed the principle relied upon by Mr. Huson in the filing of his suit, *Mallory* is nevertheless a clear and unequivocal decision of Missouri's highest court that a landowner may be held vicariously liable for the injury or death of the employee of an independent contractor if the employee is engaged in an inherently dangerous activity at the time of his injury of death. *Ballinger* reaffirmed the viability of the doctrine. The fact that no one challenged *Mallory* on any basis for more than sixty years is irrelevant to the nonretroactivity analysis and to the *Chevron* standards.

Precedent, in its simplest sense, is simply a statement that: "You *can* do A," or "You can *not* do B." The *reason* why "A" is permissible and "B" is not permissible, is not relevant to the question of whether "A" or "B" can be done. If

that were so, then anyone could escape liability for doing "B" instead of "A" by arguing that his reason for doing "B" was different from the reason the court gave for determining "B" was not permissible. Courts would become bogged down in a quagmire of litigation if precedent could be set aside or ignored merely because of one's reason for doing something other than what case precedent required.

The *reason* behind a precedent becomes relevant when, and only when, the precedent is challenged and someone seeks a change in that precedent. But merely because someone came up with a new theory or a new rationale for changing the precedent, as happened in *Zueck*, does not diminish the vitality of the earlier decision. After *Mallory*, and for more than sixty years, a landowner could be held vicariously liable under the inherently dangerous activity doctrine. The trial court in this case recognized that regardless of whether the Supreme Court of Missouri had ever considered the particular arguments raised by KCP&L in its motion for summary judgment, the inherently dangerous activity doctrine was still valid in Missouri—at least at that moment in time. [Appendix Vol. 1 at 29.] It is the result of the case which is the precedent, not the rationale for reaching the result.

The second conflict is the Missouri Court of Appeals' quantum leap from a comment in *Zueck* (quoted above) about what other jurisdictions have been doing in the past sixty years about this issue, to the conclusion that the decisions of other jurisdictions "clearly foreshadowed" what the Missouri Supreme Court would do in *Zueck*, and therefore the plaintiffs here cannot be said to have relied on existing law to their detriment. The Missouri Court of Appeals attempted to bolster this theory with the argument that the mere existence of Missouri's workers' compensation laws since 1928 "foreshadowed" the outcome of *Zueck*. If this Court permits that interpretation of *Chevron* to stand, then every attorney in Missouri would have to become an expert in the laws of every other state in this nation in order to give a client proper legal advice.

Neither the trial court nor the Missouri Court of Appeals cited a single *Missouri* appellate decision which suggested that if and when the Missouri Supreme Court was confronted with the argument that workers' compensation should be the exclusive remedy for an injured employee of an independent contractor even if he was engaged in inherently dangerous activity at the time of the injury, the Missouri Supreme Court would agree and would abolish the *Mallory* doctrine of

vicarious liability for landowners. The *Zueck* language can hardly be said to indicate that plaintiffs in this case should have known, *before filing suit*, that if someone raised the issue in the Missouri Supreme Court while this case was pending, *Mallory* would be overruled. Neither these plaintiffs nor their counsel, *nor any other plaintiffs or their counsel, in or out of Missouri*, should be held to a standard that requires the ability to foretell the future, with or without benefit of a crystal ball.

That is precisely what the Missouri Court of Appeals' application of *Chevron* would entail, however. And there is nothing in *Chevron* or its progeny which suggests that this Court intended the "clearly foreshadowed" language to impose a requirement on plaintiffs and their counsel that they be so familiar with regional or national trends in tort litigation that they can be held accountable for predicting what *their* state supreme court will do, based on events occurring elsewhere in the country.

In determining whether there has been a violation of the Equal Protection Clause, three things are examined: the character of the classification; the individual interests affected by the classification, and the governmental interests asserted in support of the classification. *Dunn v. Blumstein*, 405 U.S. 343, 92 S. Ct. 995, 999, 31 L. Ed.2d 274 (1972). But before that

analysis can take place, the standard of review must be determined: strict scrutiny, when the classification involves a suspect classification such as race, ancestry or alienage, *Hoffman v. United States*, 767 F.2d 1431, 1434 (9th Cir. 1985), or the rational basis standard, *i.e.*, whether "the classification rests on grounds wholly irrelevant to the achievement of the State's objective," *id.* at 1435, citing *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 1104-1105, 6 L. Ed.2d 393 (1961).

The classifications at issue here are two groups: those who are affected by an overruling judicial decision which changes the construction of a statute (prospective application) and those persons affected by an overruling judicial decision in tort law (prospective application if the decision deals with procedural law, retrospective application if the decision deals with substantive law, *Bethell v. Porter*, 595 S.W.2d 369, 375 (W.D. Mo. App. 1980). Actions of state courts are action of the particular state within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 842 (1948).

In *Eberle v. Koplar*, 85 S.W.2d 919, 923 (Mo. App. 1935), the court said:

> [W]here a statute or law has received a given construction by a court of last resort, the...parties who have acted in conformity with, and *in reliance upon*, such construction..., are not in any wise impaired...by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort...and the effect of the change in judicial construction is that it operates prospectively...in the same manner as though the statute or law had been amended by the legislature. [Emphasis added.]

See also, *Sumners*, *supra*, at 723, and cases there cited.

Trans UCU is consistent with the statutory construction/tort law dichotomy. There, the construction of the tax law changed, and the corporation which had relied on the earlier judicial construction of the law was not penalized for that reliance. In this case, however, by relying on a sixty-year old precedent that was reaffirmed less than a year prior to the trial of this case, plaintiffs were penalized for that reliance. If both changes in the law (statutory construction in *Trans UCU* and eliminating a tort theory of recovery here) are viewed as substantive changes in the law, which is what the Missouri Court of Appeals found, then the focus must be on whether there is a rational relationship between the differing treatment of these two groups.

This Court should determine whether it is constitutionally permissible under the Equal Protection Clause

to automatically apply changes in the construction of a statute prospectively so that persons who have relied on the prior construction are not "impaired" but to apply changes in tort law retroactively. In a statutory construction case, there appears to be only one factor for consideration, *i.e.*, reliance, whereas in a tort law case, all three *Chevron* factors are considered.

What this dichotomy means is that if there had been a statute which the Missouri Supreme Court expressly interpreted as authorizing recovery from a landowner under a vicarious liability theory when inherently dangerous activity was involved, and sixty years later, the interpretation of that statute was changed, *after* plaintiffs had won a $1,300,000 verdict based on that sixty-year-old construction, the jury award would not have been disturbed. But merely because no statutory construction was involved, yet with essentially the same sequence of events, the jury award for these children for the death of their father has been taken away.

This Court has said that a cause of action created by a state is at least arguably a species of property protected by the Due Process Clause. *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 557, 62 L. Ed.2d 481 (1980). Plaintiffs here had a cause of action established by *Mallory*. They exercised their property right under *Mallory* and filed suit. They went to

the time, trouble, expense, and emotional drain of a wrongful death suit for the loss of their father. They were successful, under the tort theory authorized by *Mallory* and reaffirmed by *Ballinger*. And they were then deprived of their cause of action by the retroactive application of *Zueck*.

If taking away the Plaintiffs' cause of action is considered substantive due process, there is no apparent relationship between any legitimate goal of the state, and the taking of the judgment. If the taking of this judgment is regarded as an issue of procedural due process, Plaintiffs had no notice and no opportunity to be heard before what they had worked so hard to obtain was taken away from them.

Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 1776-1777 (1961), said:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the balance which our Nation, built upon postulates of respect for the liberty of the individual, have struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the

traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

...the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints [citations omitted]....

...

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." [Citation omitted.]

Asserting a vested right in a jury verdict against a subsequent decision which takes away that verdict may not be

a "novel claim" in a literal sense, yet Justice Harlan's words are very relevant. Plaintiffs' right to the fruit of their labors, the judgment in their favor, is not a right clearly enunciated by explicit language in the Constitution, so there can be no "mechanical" answer to the question of whether the taking of the judgment from them was a denial of due process.

This Court should decide whether the Missouri Court of Appeals applied *Chevron* in a constitutionally permissible fashion, particularly with reference to that court's interpretation of the "clear past precedent"/"clearly foreshadowed" factor, and the "reliance" factor.

Section 3. The Issue of Remand

The issue of whether these minor plaintiffs were deprived of equal protection or due process rights under the Fifth and Fourteenth Amendments by the refusal of the Missouri Court of Appeals to remand the case in order to permit the Praysons to litigate their claim of direct liability on the part of KCP&L for the death of their father, was not raised before the trial court. It could not be, since a question of remand is a matter of decision by an appellate court. Given the denial of Plaintiffs' Motion for Rehearing and/or Transfer, and the Missouri Supreme Court's denial of Plaintiffs' Motion to

Transfer, the reality is that this Petition for a Writ of Certiorari is the first real opportunity to raise the issue.

As noted above, Plaintiffs were denied leave to file a direct liability claim against KCP&L, and proceeded to trial with their vicarious liability claim. Afterwards, when their judgment had been taken away from them, the Missouri Court of Appeals would not permit them to go forward with their claim of direct liability against KCP&L. Yet time and again, the Missouri Supreme Court has said that if there are facts which might warrant a recovery, a case should be remanded, and not merely reversed. For example:

> The rule stated in *Smith v. Terminal R. R. Ass'n of St. Louis*, Mo. App., 160 S.W.2d 476, 479, applies: "The furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had; and even though the plaintiff fails to substantiate the theory upon which his case wa tried, if he nevertheless shows a state of facts which might entitle him to recover if his case were brought upon a proper theory, the judgment will not be reversed outright, but instead, in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition, if so advised, so as to state a case upon the theory which the evidence discloses. [Citation omitted.]"

Smith v. Inter-County Telephone Company, 559 S.W.2d 518, 525 (Mo. 1977) (en banc). *See also, Kaufmann v. Nagle*, 807 S.W.2d 91, 95 (Mo. 1991) (en banc).

Plaintiffs argued to the Missouri Court of Appeals that the direct liability claim in Count I of the Second Amended Petition [Appendix Vol. 1 at 31], arguably stated a claim of direct or primary liability on the part of KCP&L under the safe workplace doctrine, "under which one who contracts with an independent contractor has a duty to provide a safe workplace for the employees of the independent contractor," *Donovan v. General Motors*, 762 F.2d 701 (8th Cir. 1985); the "retained possession" doctrine, Restatement (Second) Torts, §422 (1965); the "retained control" doctrine, Restatement (Second) Torts, §414 (1965), and under the theory that Mr. Bunger was a third-party beneficiary of the contract between KCP&L and B & L Electric which contained provisions mandating the safety procedures which were to be followed, and that KCP&L failed to provide B & L with those standards and procedures.

The Missouri Court of Appeals, however, chose to address only the theory that Mr. Bunger was a business invitee and to analyze the case from that perspective [Appendix Vol. 1 at 23-25], and found that Mr. Bunger knew just as much about the dangers of electricity as KCP&L and therefore there was no

need for KCP&L to provide him with any warnings. While noting that if KCP&L had undertaken to supervise or monitor the work of its independent contractor, as Plaintiffs alleged that KCP&L failed to do, KCP&L might have incurred liability, citing *Werdehausen v. Union Electric Company*, 801 S.W.2d 358, 364 (E.D. Mo. App. 1990), the Missouri Court of Appeals concluded that because Plaintiffs alleged that KCP&L failed to supervise or monitor, rather than that it did so in a negligent fashion, no cause of action was stated in Count I of the Second Amended Petition. [Appendix Vol. 1 at 25.]

What the decision of the Missouri Court of Appeals has done is to wipe out a verdict in favor of the Prayson children for the loss of their father, and erase the possibility that the Praysons might successfully plead and prove a direct liability theory against KCP&L. Under the particular circumstances of this case, where a theory of recovery in place for six decades is suddenly abolished, this Court should determine whether, considering the fact that Plaintiffs initially attempted to plead a claim of direct liability against KCP&L but were foreclosed from doing so, the Equal Protection and/or Due Process Clauses require that at a minimum they be given the chance to do so now.

In *Chevron*, the time and expenses connected with a year of discovery and the possibility of a substantial loss of earning power for the plaintiff was enough to mandate the nonretroactive application of this Court's decision in *Rodrigue.* This Court should decide whether the retroactive application of *Zueck* was constitutionally permissible, and if so, whether it was also constitutionally permissible to deny the Praysons the chance to plead and prove a direct liability claim against KCP&L.

Plaintiffs sought leave to file a Second Amended Petition, which included a direct liability claim against KCP&L in Count I, and an indirect or vicarious liability claim against KCP&L in Count II. [Appendix Vol. 1 at 31.] The trial court denied leave on the basis that Count I of the Second Amended Petition failed to state a cause of action [Appendix Vol. 1 at 43], apparently reasoning that the Missouri Supreme Court's decision in *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc) had abolished the possibility of direct liability claims against a landowner by an injured employee of an independent contractor. A Third Amended Petition was filed using *Ballinger* as a model, and the vicarious liability theory was the only one on which Plaintiffs were permitted to proceed to trial. They won under that theory.

During the course of the appeal, Plaintiffs argued unsuccessfully that if the appellate courts were going to take away their verdict through retroactive application of *Zueck*, then the case should have been remanded to permit Plaintiffs the opportunity to prove their claim of direct liability against KCP&L.

In the context of amendments to pleadings, this Court has said:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. [Citation omitted.] If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, "be freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 230, 9 L. Ed.2d 222 (1962). The Federal Rules are not involved in this case, of

course, but the spirit of them is, in the sense that the denial of an opportunity to plead and prove a direct liability claim against KCP&L takes on a constitutional dimension when connected with the deprivation of the jury's verdict under the retroactive application of *Zueck*.

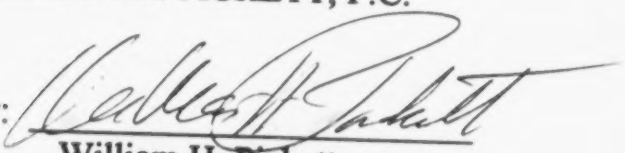
This case was not tried in the Circuit Court of Jackson County on any theory of direct liability. No evidence was presented to the trial court which could be reviewed by any appellate court concerning whether KCP&L could be held directly liable for the death of Mr. Bunger, because Plaintiffs were denied leave to amend their pleadings to state a direct liability claim. Regardless of whether Count I of the Second Amended Petition was artfully or inartfully written, under the particular facts of this case, this Court should decide whether Plaintiffs' due process or equal protection rights were violated by the failure to remand the case to allow them to pursue their direct liability claim, with or without further amendment of their pleadings.

CONCLUSION

This Petition for a Writ of Certiorari to the Western District of the Missouri Court of Appeals should be granted to determine whether the retroactive application of *Zueck v. Oppenheimer Gateway Properties, Inc.*, 804 S.W.2d 384 (Mo. 1991) (en banc), to take away the Praysons' wrongful death judgment was constitutionally permissible, and if so, whether it was then constitutionally permissible to refuse to remand the case to give the Praysons an opportunity to attempt to plead and prove their earlier claim of direct liability on the part of KCP&L for the death of Mr. Bunger.

Respectfully submitted,

WILLIAM H. PICKETT, P.C.

By: 

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